U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

Issue Date: 08 December 2006

CASE NO.: 2005-STA-00052

In the Matter of:

FREDERICK J. ANDREWS,
Complainant,

v.

GRIFFIN INDUSTRIES, INC.,
Respondent.

Frederick J. Andrews, Richmond, VA, *Pro Se*
For Claimant

David Nalley, Esq., Murphy, Nalley, and Associates, Covington, Kentucky
For Respondent

Before: PAMELA LAKES WOOD
Administrative Law Judge

RECOMMENDED DECISION AND ORDER DISMISSING CLAIM

The above captioned matter arises from a claim under the employee protection provisions of Section 405 of the Surface Transportation Assistance Act (hereafter "STAA") of 1982, as amended and re-codified, 49 U.S.C. § 31105. The pertinent implementing regulations appear at Part 1978 of Title 29 of the Code of Federal Regulations (hereafter "CFR"). Section 405 of the STAA prohibits an employer from disciplining, discharging, or otherwise discriminating against any employee regarding pay, terms or privileges of employment because the employee has undertaken protected activity by either 1) participating in proceedings relating to the violation of a commercial motor vehicle safety regulation or 2) refusing to operate a motor vehicle when the operation would violate these rules. As I discuss in greater detail below, I recommend that his claim be dismissed.

PROCEDURAL BACKGROUND

Procedural History

On May 20, 2001, Mr. Frederick J. Andrews ("Complainant") filed a discrimination complaint under the STAA alleging that Respondent, Griffin Industries, Inc. ("Respondent")

terminated his employment on January 10, 2005, in retaliation for his refusal to drive in excess of allowable hours and for his refusal to drive an unsafe truck. Following an investigation, on June 17, 2005, the Regional Administrator for the Occupational Safety and Health Administration (hereafter "OSHA"), of the United States Department of Labor (hereafter "DOL"), found no reasonable cause to believe that Respondent violated the Act and dismissed Complainant's complaint. By way of letter dated July 27, 2005, Complainant timely appealed the decision to this tribunal.

On August 3, 2005, the undersigned issued a Notice of Assignment, Notice of Hearing, and Prehearing Order informing the parties that a hearing for this matter would be held in the Richmond, Virginia vicinity on September 2, 2005. By way of joint agreement of the parties, this date was cancelled. On October 20, 2005, the undersigned issued a Second Notice of Hearing and Prehearing Order setting a hearing on December 8, 2005, in Richmond, Virginia.

Record of Hearing/Evidence

A hearing on this matter was held in Richmond, Virginia on December 8, 2005.[1] Complainant chose to proceed *pro se* and confirmed his decision with this tribunal. (Tr. 5). Respondent was represented by counsel. Both parties received a full and fair opportunity to present evidence and arguments, and examined the following witnesses: Complainant (Tr. 9-55); Mr. Robert Butler, a former employee of Respondent ("Butler") (Tr. 55-60)[2]; Mr. Bill Walsh, a Customer Service Representative for Respondent ("Walsh") (Tr. 61-76); and Ms. Nancy Cooper, Human Resources Director for Respondent ("Cooper") (Tr. 77-80).

The following exhibits were offered and received during the hearing: CX 1 (Complainant's driving logs from December 28, 2004, and his written statement of that day's events), CX 2 (logs from December 30, 2004, a letter from Butler, and Complainant's written statement regarding December 30), CX 3 (seven driving logs showing the "magnitude" of the additional requested route), CX 4 (logs from December 31, 2004, and a pay stub showing holiday payment for the same date), CX 5 (statement from Virginia Employment Commission stating Complainant was eligible to receive unemployment), CX 6 (driver log from November 11, 2004, stating Truck #1538 broke down), CX 7 (written statements from Complainant), CX 8 (a receipt of repair for Complainant's truck that broke down on December 28, 2004), CX 9 (driver's log from January 3, 2005), and CX 10 (employee handbook). Regarding Exhibits CX 1-4, CX 6, and CX 9, counsel for Respondent agreed that any handwritten notations were part of the document and therefore did not object to them. (Tr. 31-32). However, I did rule that handwritten notations on any other exhibit would merely be considered as arguments, and that the objections made would only go to weight, not admissibility. *Id*. at 31.

Both parties gave closing summations and opted not to submit written briefs. At the close of the hearing I announced that I would not keep the record open. (Tr. 88). However, by

[1] References to the hearing transcript appear as "Tr." followed by the applicable page number(s). Exhibits offered by Complainant will be referred to as "CX", followed by the exhibit number (e.g., CX 2).

[2] At one point in the transcript, Mr. Butler is incorrectly identified as Mike Blackstock. (Tr. 55). However, this is incorrect.

way of letter dated January 8, 2006, Complainant submitted several photographs, documents, and calculations of his damages to this court. By way of Order issued January 23, 2006, I informed the parties that I would consider the letter a Motion to Reopen the Record and Submit Additional Briefing. Respondent objected to the submission of this evidence. By way of Order issued March 15, 2006, I stated that I would deny the motion without prejudice and would reconsider it only if Complainant succeeded on the issue of liability.[3]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Factual Background

Nature of Employment Relationship:

Complainant was employed by Respondent from the last week of July 2004 up until January 10, 2005. (Tr. 9). Complainant was employed as a truck driver for Respondent and was an hourly employee. *Id*. Respondent's truck drivers picked up used cooking grease from restaurants with their trucks. *Id*. at 62. The trucks would go to their client's places of business and siphon the grease from containers owned by the client into containers owned by the Respondent, which were on the truck. *Id*. Afterwards, the grease would be taken to a different location where it would be processed and recycled. *Id*. Respondent considered it essential to service its customers on time; otherwise, a restaurant's grease container could spill or overflow if too much grease were stored in it. *Id*. at 62-63.

Complainant worked out of Respondent's shop located at Doswell, Virginia. *Id*. at 11. This location had two trucks used for grease collection, a primary and a secondary truck. CX 7. Complainant was responsible for collecting grease from customers in Virginia two or three times a week. *Id*. Once he collected the grease, Complainant would then load the grease onto another tank trailer. *Id*. Complainant would then take this tank trailer to Durham, North Carolina and exchange it for another empty trailer on days he was not driving a route to collect grease. *Id*.

December 28, 2004

On December 28, 2004, Complainant was driving to Durham to deliver grease. (Tr. 16). The truck Complainant was driving for this route was Respondent's primary truck. *Id*. at 48. Complainant had reached Henderson, North Carolina when his truck broke down, requiring him to call Walsh and inform him of the situation. *Id*. at 16. Walsh arranged for the truck to be towed to a nearby mechanic and informed Complainant to wait for the truck to be repaired. *Id*. at 17. After several hours, Walsh informed Complainant that he would make arrangements for Complainant to receive a ride or to stay in a hotel overnight. *Id*. at 65. Complainant called family located in Henderson and asked for a ride to the Raleigh/Durham airport in order to rent a car to drive home. *Id*. at 17-18. Complainant rented a car and arrived home between 1:00 A.M. and 2:00 A.M. Complainant alleges that he was on duty for twenty-one hours that day, however, he recorded his driving logs as showing only twelve hours of service so that it would appear "legal." CX 1.

[3] As Complainant has not succeeded on the issue of liability, there is no need for me to reconsider the motion.

The primary truck could not be returned to Respondent's shop on December 30, 2004. *Id*. at 69.[4] Complainant was initially scheduled to work on December 29, 2004, however, given the length of his previous day, Walsh told him to take the day off. *Id*. at 66. However, he was also informed that he would have to work the next day. *Id*. at 19.

December 30, 2004

Complainant arrived to work on December 30, 2004, at 5:00 a.m. (Tr. 19). Because Respondent's primary truck was unavailable, Complainant had to use its secondary truck. *Id*. at 20. Prior to driving that truck for that day's route, Complainant was aware that the truck had some problems with it, but chose to drive it anyway.[5] *Id.* Complainant was scheduled only to deliver grease to a processing site in Durham. *Id*. at 19.

At approximately 1:30 p.m., when Complainant was toward the end of driving his route, Walsh called Complainant and asked him to drive an additional route that day. *Id*. at 10. He was asked to drive a route to Williamsburg, Hampton, and Norfolk. CX 2. Complainant informed Walsh that he did not want to drive the truck because it was unsafe; however, Walsh testified that Complainant did not mention any safety problems initially. (Tr. 10, Tr. 67). Walsh did agree that after Complainant returned to Doswell, he raised the issue of the vehicle's safeness and refused to drive an additional route. (Tr. 67). However, this was not the only issue Complainant raised.

In addition to the safety issue, Complainant believed that driving an additional route would place him past the maximum allowable hours prescribed by the Department of Transportation ("DOT"). *Id*. at 57. Because of his refusal to drive an additional shift on December 30, Walsh told Complainant that he would have to drive the requested route on December 31. *Id*. at 11. However, Complainant refused to work on the 31st, telling Walsh that he did not want to work on a holiday. *Id*.; *see also* CX 1. Complainant believed that New Year's Eve was a paid holiday and he therefore did not have to work. CX 1. Although New Year's Eve was ordinarily not a company holiday, it was a holiday in 2004 because New Year's Day (January 1, 2005) fell on a Saturday.[6] (Tr. 70, 79). However, while Respondent's employees were paid for holidays, they did not always get them off and they were expected to

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[4] The bill of repair stated that the truck was brought in and fixed on December 28, 2004. CX 8. However, it also states that 39.50 hours were spent total fixing it. *Id*. I find the latter time to be accurate given the testimony at the hearing.

[5] Complainant testified as follows:

> Q What actually was wrong with the truck, the one you drove on the 30th?
>
> A Okay. It always had a steering problem. It had a crack in the tank, always had a slow leak. The - and I think the suspension on the left side of it was not good. You can visibly see it in the daytime, but at that time of night in [Doswell] it's kind of dark. They have a few light, but you can't really, you know, see what's wrong, you know, with the truck.
>
> So, I mean, he posted the truck up for me to drive and I've taken the risk, you know, on several occasions to drive that truck. But, like I said, when I did take that run I noticed that the truck was worse off than when he sent it to Durham back in November.
>
> (Tr. 19-20).

[6] I take judicial notice of the fact that for employees of the Federal government who worked a Monday through Friday schedule, December 31, 2004 was a holiday, because January 1, 2005 fell on a Saturday. See the OPM website, www.opm.gov, for a list of Federal holidays in 2004 and 2005.

work on holidays when pickups were required. (Tr. 78-79). In fact, employees routinely worked on holidays and Walsh worked on New Year's Eve in 2004. *Id*. at 70, 79.

Complainant refused to work on December 31, citing both the perceived holiday and the unsafe truck. *Id*. at 11. Complainant did not ask Walsh or any other managerial personnel if another truck would be available the next day. *Id*. at 40-41. Walsh testified that he would have been able to retrieve another truck from a nearby facility in time for the route to be run on December 31, 2004. *Id*. at 69. In fact, he had contacted the fleet manager in Marshfield, North Carolina and was in the process of making arrangements to get another truck. *Id.* Upon further questioning, he indicated that the truck could also have come from Durham, North Carolina. *Id.* at 74. Walsh testified that he did not get the truck because Complainant refused to work and there were no other drivers. *Id.* at 75. However, Walsh picked up the repaired primary truck from Henderson on December 31. *Id*. at 70. Complainant testified that there were no trucks available in Durham and that Respondent had another driver who would fill in, Bruce La Barge. *Id.* at 53, 75, 82.

After clocking off of work on December 30, Complainant returned to his truck to drop off a booklet regarding the vehicle's operation. *Id*. at 12. He discovered that grease had leaked from the truck he had been driving earlier that day. *Id*. Walsh asked Complainant to help him clean up the grease, but Complainant refused because he had already clocked out and was upset with Walsh. *Id*.

Walsh testified that because New Year's day fell on a Saturday, December 31 was a holiday. *Id.* at 70. However, Walsh worked on December 31. *Id.* Respondent's H.R. Director, Nancy Cooper, testified that although employees were paid for holidays, they sometimes had to work on holidays to make pickups to service their customers. *Id.* at 77-79. In such instances, the employees would be paid for the holiday and also for the hours worked. *Id.* at 79.

Termination of Employment

After December 30, 2004, Complainant did not return to work until January 2, 2005. (Tr. 14). Walsh called Complainant and informed him that the primary truck was fixed, so Complainant came to work and worked what he described as a "normal day." *Id*. On January 10, 2005, Walsh asked Complainant to meet with him and Bradford, Doswell's General Manager. *Id*. In the meeting, Bradford informed Complainant that he was being terminated for insubordination. *Id*. Specifically, Complainant was being terminated for not driving the route that Walsh requested him to on Friday, December 31, 2004. *Id*; *see also Id.* at 71.

Losses and Damages

After his termination, Complainant remained unemployed for around five to six months in order to take care of his child. (Tr. 21-22). However, he received $6,000.00 in unemployment. *Id*. at 21. At the time of the hearing, Complainant worked for Transport Leasing Corporation, a company that provides drivers to agencies that need them. *Id*. at 22. Complainant testified that he would usually make between $12.00 and $14.00 an hour. *Id*. When he was employed by Respondent, he earned $14.50 hourly plus overtime. *Id.* at 9.

Legal Background

The employee protection provisions of the STAA, 49 U.S.C. §31105, prohibit discriminatory treatment of employees who have engaged in certain activities related to commercial motor vehicle safety. To invoke the whistleblower provisions of the STAA, complainant has the burden of proof to establish that he engaged in protected activity and that he was subjected to adverse action. He must also present evidence that Respondent was aware of the protected activity and took adverse action because of this awareness. *Byrd v. Consolidated Motor Freight*, 1997-STA-9 at 4-5 (ARB May 5, 1998).

Under 49 U.S.C. §31105 (a)(1)(A), an employee is engaged in protected activity if he or she has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order. Courts have found that it is "eminently reasonable" for the DOL to interpret this provision to include internal complaints from an employee to an employer." *Clean Harbors Environmental Services, Inc. v. Herman*, 146 F.3d 12, 20 (1st Cir. 1998). If the internal communications are oral, however, they must be sufficient to give notice that a complaint is being filed and thus the activity is protected. There is a point at which an employee's concerns and comments are too generalized and informal to constitute "complaints" that are "filed" with an employer within the meaning of the STAA. *Id*. at 22. A safety complaint made to any supervisor in the chain of command is deemed to be protected activity. *Zurenda v. J & K Plumbing and Heating Co., Inc*., 1997-STA-16 at 5 (ARB, June 12, 1998).

An employee is also protected under the STAA when an employee refuses to operate a vehicle in violation of any federal rules, regulations, standard, or orders applicable to commercial vehicle safety or health. 49 U.S.C. §31105 (a)(1)(B)(i). Protection under this clause requires that a complainant demonstrate that operating a commercial motor vehicle would result in an actual violation of a pertinent motor vehicle standard. *Schulman v. Clean Harbors Environmental Services, Inc.*, 1998-STA-24 at 7 (ARB Oct. 18, 1999). Similarly, the STAA protects an employee who refuses to operate a commercial motor vehicle, which he or she reasonably believes would cause serious injury to the employee or the public due to its unsafe condition. 49 U.S.C. §31105(a)(1)(B)(ii); *Schulman*, 1998-STA-24 at 8. If an employee objects to an unsafe condition but nevertheless drives the truck, the protection afforded the employee should be analyzed as a "complaint" under 49 U.S.C. §31105 (a)(1)(A), not a refusal to drive. *Zurenda*, 1997-STA-16 at 5.

A complainant may establish unlawful discrimination in either of two ways**.** *Wright v. Southland Corp*., 187 F.3d 1287, 1293 (11th Cir. 1999).

First, relying on the traditional approach, the complainant may show, through direct evidence that more likely than not, the respondent engaged in unlawful discrimination.[7] *Id*. The respondent may avoid liability by asserting an affirmative defense if it can provide evidence of a legitimate purpose for engaging in such discrimination. The burden of proof shifts, placing the

[7] The Court defines direct evidence for purposes of employment discrimination as "evidence from which a reasonable trier of fact could find, more probably than not, a causal link between an adverse employment action and a protected [activity]." *Wright*, 187 F.3d at 1293.

onus on the respondent to show, by a preponderance of the evidence, that it would have taken the same action, in the absence of discrimination. *See Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 287 (1977). If the trier of the fact concludes that the respondent was motivated by reasons that are both prohibited and legitimate (dual motives), the respondent may escape liability only by establishing that it would have reached the same decision even in the absence of the protected conduct. Where the evidence of record clearly does not support a finding of any unlawful motive on the part of the respondent, the "dual motive" analysis is inappropriate. *Schulman*, 1998-STA-24 at 10. *Cf. Desert Palace dba Caesar's Palace Hotel & Casino v. Costa*, 123 S.Ct. 2148 (June 9, 2003) (under the 1991 amendments to Civil Rights Act, direct evidence of discrimination is unnecessary to obtain a mixed-motive jury instruction).

Since directly proving discriminatory intent may be difficult, the U.S. Supreme Court developed a second approach that enables a complainant to present a rebuttable presumption of illegal discrimination through circumstantial evidence. *See Wright*, 187 F. 3d at 1290. The ARB has applied this approach in STAA cases, and in *Byrd*, 1997-STA-9 at 4-5, the ARB summarized the burdens of proof and production in this type of case (citations omitted):

> A complainant initially may show that a protected activity likely motivated the adverse action. A complainant meets this burden by proving (1) that he engaged in protected activity, (2) that the respondent was aware of the activity, (3) that he suffered adverse employment action, and (4) the existence of a "causal link" or "nexus," e.g., that the adverse action followed the protected activity so closely in time as to justify an inference of a retaliatory motive. A respondent may rebut this *prima facie* showing by producing evidence that the adverse action was motivated by a legitimate nondiscriminatory reason. The complainant must then prove that the proffered reason was not the true reason for the adverse action and that the protected activity was the reason for the action.

When the nexus between the protected activity and the adverse employment action is established inferentially in this way, temporal proximity may be sufficient to raise the inference that a respondent's adverse actions were taken in retaliation for a complainant's protected activities. *See Couty v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989); *see also Simon v. Simmons Foods, Inc*., 49 F.3d 386, 389 (8th Cir. 1995). Once a complainant successfully raises the presumption of discrimination, then the respondent may produce evidence that the action was motivated by a legitimate nondiscriminatory reason. If a complainant is able to meet this burden, then the burden shifts back to the complainant once again to show that the proffered reason for discrimination was not the true reason for the adverse action. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). This concept is referred to as the "pretext" analysis. *Id*. at 803.

The United States Supreme Court in *Reeves v. Sanderson Plumbing Products, Inc*., 530 U.S. 133 (2000), explained the "pretext" phase of the analysis as introduced in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506-508 (1993). The Court first reiterated that if an employer articulated a non-discriminatory reason for the challenged adverse action, the complainant retains the ultimate burden to show the stated reason is pretext for unlawful discrimination. To meet

that ultimate burden, the complainant may, but not necessarily will, prevail based on the combination of a *prima facie* case and sufficient evidence to demonstrate the asserted justification is false. If the justification is determined to be false, the trier of fact may conclude the employer engaged in unlawful discrimination. *Reeves*, 530 U.S. at 140. Thus, there may be a valid inference that the employer's falsehood is an attempt to cover up the unlawful discrimination.

Regardless of whether a complainant establishes a *prima facie* case, the respondent may set forth an affirmative defense by showing that it had a legitimate business reason for terminating the employment relationship. *Wignall v. Golden State Carriers, Inc.*, 1995-STA-7 at 5 (Sec'y July 12, 1995). In *Johnson v. Roadway Express, Inc.*, 1999-STA-5 at 12 (ARB Mar. 29, 2000), the ARB recognized that once a respondent produces evidence to articulate a legitimate, nondiscriminatory reason for its actions, the more relevant inquiry is "whether complainant prevailed, by a preponderance of the evidence, on the ultimate question of liability." More specifically, the ALJ should consider whether one of the real reasons for the complainant's dismissal from employment was his safety complaints. *Id*.

Discussion

A complainant seeking to prevail in a whistleblower case under the STAA must demonstrate: (1) he was an employee working for an employer covered by the STAA; (2) he engaged in protected activity during the course of that employment; (3) the employer was aware of his involvement in the protected activity; (4) he was subject to an adverse action; and (5) a nexus exists between the protected activity and the adverse employment action. *Byrd v. Consolidated Motor Freight*, 1997-STA-9 at 4-5 (ARB May 5, 1998).

Status as Employee and Employer

The relevant portion of the STAA defines an employee as a "driver of a commercial motor vehicle…a mechanic, a freight handler, or an individual not an employer who…directly affects commercial motor vehicle safety in the course of employment by a commercial motor carrier." 49 U.S.C. §31101(2)(A); *see also* 29 C.F.R. §1978.101(d). An employer is defined as "a person engaged in business affecting commerce that owns or leases a commercial motor vehicle in connection with that business, or assigns an employee to operate the vehicle in commerce." 49 U.S.C. §31101(3)(A). Based on the evidence presented in the record, I find that Complainant and Respondent fall under the respective definitions of employee and employer as set forth under the STAA.

Adverse Employment Action

Complainant testified that he was officially informed on January 10, 2005, that he was being terminated from his employment with Respondent. (Tr. 14-15). Administrative authorities deciding STAA cases generally require that the employer's action create a tangible job consequence. *See Agee v. ABF Freight Systems, Inc.*, ARB No. 04-182, ALJ No. 2004-STA-40 (ARB Dec. 29, 2005). A tangible consequence has been defined by the Supreme Court as something "which constitutes a significant change in employment status such as hiring, firing,

failing to promote, reassignment with significantly different responsibilities, or a decision causing significant change in benefits." *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 761 (1998). Termination in response to engaging in protected activities is clearly a tangible job consequence that satisfies the adverse action requirement. Therefore, I find that Complainant has satisfied this element of his case.

Protected Activity

Complainant argues that he engaged in two activities which are protected under the STAA. First, Complainant alleges that he lawfully refused to operate an unsafe vehicle on December 30th and 31st at Respondent's request. Second, he alleges that he lawfully refused to drive over the maximum allowable hours as set forth by the Department of Transportation ("DOT") on December 30. As discussed *infra*, I find that even if Complainant has proved by a preponderance of the evidence that he engaged in protected activities under the STAA, he has not satisfied his ultimate burden of proving that the protected activity led to his termination.

The relevant portion of the STAA prohibits an employer from discharging an employee when:

> [T]he employee refuses to operate a vehicle because—
>
> (i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health, or;
>
> (ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition.

49 U.S.C. §§31105(a)(1)(B)(i) and (ii). These statutory provisions protect an employee who refuses to drive a truck in two situations.

Forty-nine U.S.C. §31105(a)(1)(B)(i) protects an employee who refuses to drive a vehicle because its operation would violate a specific regulation, standard, or order of the United States related to commercial motor vehicle safety or health. In other words, if a complainant demonstrates that an actual violation of a promulgated authority would occur if he operated the vehicle, then he is protected under the STAA for refusing to operate the vehicle. A complainant need not necessarily point to any specific authority. *Pro se* complainants in particular are generally excused from doing so. *See Perrine v. Poole Truck Line, Inc.*, 1985-STA-13 (Sec'y Mar. 11, 1986).

Although a *pro se* complainant need not articulate a specific regulation that has been violated, like any other employee seeking protection under the STAA, he must demonstrate by a preponderance of the evidence that an actual violation would occur if the truck were operated. *Hilburn v. James Boone Trucking*, ARB No. 04-104, ALJ No. 2003-STA-45, slip op. at 4-5 (ARB Aug. 30, 2005). Thus, it is not enough for a complainant to state that he has a good faith subjective belief that the vehicle was unsafe, he must actually prove it was. *Id*. at 5; *Wrobel v. Roadway Express, Inc.*, ARB No. 01-091, ALJ No. 2000-STA-48, slip op. at 4 (ARB July 31, 2003).

In contrast to 49 U.S.C. §31105(a)(1)(B)(i), §31105(a)(1)(B)(ii) places a less onerous burden upon the complainant. Under this provision, an employee is not required to drive a vehicle if he has a "reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition." §31105(a)(1)(B)(ii). Thus, it is not necessary for a complainant to prove that an actual violation would occur if he were to operate the vehicle. *See Wrobel*, ARB No. 01-091, at 5, n.4 (*citing Ass't Sec'y v. Consol Freightways*, ARB No. 99-030, ALJ No. 98-STA-26, slip op. at 5 (ABR Apr. 22, 1999)). A complainant seeking this provision's protection must establish by a preponderance of the evidence that: (1) he refused to operate the vehicle because he was apprehensive of an unsafe condition of the vehicle, (2) his apprehension was objectively reasonable, (3) he sought to have the respondent correct the problem, and (4) the respondent failed to do so. *See Brick's Inc. v. Herman*, 148 F.3d 175, 181 (2nd Cir. 1998). This test essentially sets forth the statutory requirements that:

> Under paragraph (1)(B)(ii) of this subsection, an employee's apprehension of serious injury is reasonable only if a reasonable individual in the circumstances then confronting the employee would conclude that the unsafe condition establishes a real danger of accident, injury, or serious impairment to health. To qualify for protection, the employee must have sought from the employer, and been unable to obtain, correction of the unsafe condition.

49 U.S.C. §31105(a)(2). Given the two above statutory protections, my analysis must focus on whether Complainant engaged in activities protected by them. Furthermore, I must examine the alleged protected activities in light of the events on December 30th and 31st. Examining both statutory provisions, I find that Complainant engaged in protected activity when he refused to drive his vehicle on December 30, 2004, but did not engage in protected activity when he refused to drive a vehicle on December 31, 2004. Consequentially, Respondent was within its lawful limits to terminate Complainant's employment.

December 30, 2004

A. Driving an Unsafe Vehicle

Complainant first alleges that Respondent unlawfully terminated him after he refused to drive an unsafe truck on December 30, 2004. Respondent counters that Complainant's termination did not result from his refusal to drive an unsafe vehicle; rather, his termination arose from his refusal to drive an additional route on December 31, 2004.

As detailed above, 49 U.S.C. §31105(a)(1)(B)(i) prohibits an employer from retaliating against an employee who refuses to operate a vehicle when an actual violation of a "regulation, standard, or Order of the United States" would occur. Employees are also protected if they have a reasonable apprehension of injury to themselves or others, regardless of whether an actual violation of some authority has occurred. 49 U.S.C. §31105(a)(1)(B)(ii). In his request for a hearing before this office, the Complainant stated that he was terminated for refusing to drive an unsafe vehicle, although he did not make clear under which statutory provision he was proceeding. Therefore, I will analyze his unsafe vehicle claim under both.

Turning first to §31105(a)(1)(B)(i), I note that Complainant has cited to no safety standard; however, a *pro se* litigant need not do so. *See Perrine, supra*. Examining the federal regulations in effect at the time of Complainant's termination, the one that appears to be most applicable given Complainant's testimony (which included complaints about steering problems, suspension, and leakage) is 49 C.F.R. §392.7 (2004). This regulation provides:

> No commercial motor vehicle shall be driven unless the driver is satisfied that the following parts and accessories are in good working order, nor shall any driver fail to use or make use of such parts and accessories when and as needed:
>
> Service brakes, including trailer brake connections.
> Parking (hand) brake.
> **Steering mechanism**.
> Lighting devices and reflectors.
> Tires.
> Horn.
> Windshield wiper or wipers.
> Rear-vision mirror or mirrors.
> Coupling devices.
> [Emphasis added.]

Id; *see also* 49 C.F.R. §396.13(a) (2004) (stating that a driver shall "be satisfied" that the motor vehicle is in safe operating condition before he drives it). Complainant also cited other problems not listed in the statute, including problems with the suspension and a leak in the tank that held the grease. (Tr. 20). These complaints also form the basis for the protection afforded under §31105(a)(1)(B)(ii).

I first turn to whether Complainant has demonstrated that an actual violation of a safety standard would have occurred had he operated the truck at issue. Complainant believed several mechanical problems existed with the truck. (Tr. 20). This belief was based on his personal experience with the truck, which he had noticed when he previously drove the same truck, but which had worsened. *Id.* He further testified that grease began leaking from the truck after Complainant clocked out on December 30. *Id*. at 12-13. Walsh testified that he was not certain whether the leak occurred because of the truck or some kind of operator error, possibly his own. *Id*. at 73-74. However, he apparently took the complaints seriously as he was in the process of trying to obtain another truck for Complainant's use.

Based on Complainant's unrefuted testimony, it is unclear whether an actual violation would have occurred had he operated the truck to drive an additional route on December 30. While Complainant may genuinely have had a good faith belief that his vehicle was inoperable, a subjective belief is not enough to activate the protection granted under 49 U.S.C. §31105(a)(1)(B)(i), which requires violation of a regulation, standard, or order. Although Complainant had experience driving Respondent's trucks, his opinion regarding the functionality of his truck alone is not enough for a successful claim under this statutory prong. *See Brame v. Consolidated Freightways*, 1990-STA-20 (Sec'y June 17, 1992) (finding against driver who refused to drive a truck with faulty brakes when this assessment was based solely on his

subjective opinion when there was objective evidence that the brakes were in compliance with safety standards). Although Complainant complained of steering and suspension problems, he admitted that he had driven the truck with these same problems previously. Furthermore, he drove the truck on the 30th as well, suggesting that the problems did not rise to the level of an actual violation. The above testimony regarding the grease spill presented some circumstantial evidence regarding a potential grease tank leak. However, the record is unclear on whether this was the result of a problem with the truck or some other factor, and it is unclear whether a safety requirement was violated. On the other hand, Respondent has offered no evidence that the truck was safe to drive and was in the process of obtaining a safe vehicle as a substitute. It is unclear whether either Complainant's actions or Respondent's actions were motivated by the violation of a specific safety standard rather than by generalized concerns about safety. Under these circumstances, I find that Complainant has provided insufficient evidence of an actual violation of a safety standard to satisfy the requirements of 49 U.S.C. §31105(a)(1)(B)(i).

Since Complainant has not made out a claim for protection under 49 U.S.C. §31105(a)(1)(B)(i), I must determine whether he has established a valid claim under §31105(a)(1)(B)(ii). As stated *supra*, the plain language of the statute only requires an employee to have a reasonable apprehension of injury to the employee or some other person. *Id*. Courts have used this language to create the four-part test discussed *supra.* I find the first prong of the test, the requirement that the complainant refuse to operate the vehicle because of apprehension of an unsafe condition, to be particularly critical in the instant claim.

To invoke the protection of §31105(a)(1)(B)(ii), a complainant must prove by a preponderance of the evidence that there existed a "bona fide danger of an accident or injury" as a result of the vehicle's unsafe condition. *Calhoun v. United Parcel Serv.*, 2002-STA-31, slip op. at 21 (ALJ June 2, 2004) (*citing Robinson v. Duff Truck Line, Inc*., 1986-STA-3, slip op. at 9-10 (Sec'y Mar. 6, 1987). At the hearing, Complainant offered his testimony in support of his contention that he had a reasonable apprehension of injury.

Complainant testified that on the morning of December 30, he arrived at Respondent's location in Doswell to drive his route in the only one of Respondent's remaining trucks at the site. (Tr. 37). When Complainant arrived at the site, Walsh was not present. *Id*. Complainant decided to drive the truck, although he was aware that it had safety issues. *Id*. at 37-38; *see also Id*. at 20. Complainant also did not fill out a pre-trip safety inspection report, although he did fill out an inspection report during the trip. *Id*. at 38. Complainant did not actually tell Walsh about safety issues with the truck he was driving until he was asked to drive an additional route on December 30, or in the alternate, on December 31. *See Id*. at 10; *see also Id*. at 37-38. Additionally, Complainant did not inform any of Respondent's other personnel of safety issues with the truck, nor did he inquire about any alternate truck's availability despite the fact that he knew Respondent's other nearby facilities had trucks. *Id*. at 37-42.

Analyzing Complainant's testimony, I find that he has presented sufficient evidence to establish a reasonable basis for apprehension that his continuing to operate the truck could result in injury to himself or others. In this regard, it is Complainant's unrefuted testimony that he complained about the steering, suspension, and leakage problems during at least one conversation with Walsh on December 30, and his complaints were given credence by Walsh,

who made plans to obtain a replacement truck. Although the testimony presented by Complainant does not sufficiently demonstrate that his operation of the vehicle would have created an actual violation, he has established that he had a reasonable apprehension of injury to himself or others if he had operated the vehicle. Therefore, Complainant engaged in protected activity within the meaning of 49 U.S.C. §31105(a)(1)(B)(ii) when he refused to operate Respondent's vehicle on December 30, 2004, because he had a reasonable apprehension about the vehicle's safety.

B. Driving In Excess of Allowable Hours

Complainant also alleges that Respondent attempted to have him drive his truck in violation of DOT allowable hours on December 30. Complainant refused to comply and, he argues, was terminated in response. Respondent counters that when Complainant was asked to drive an additional route, he was well within allowable hours and the requested route would not have placed him in violation.

Applying the actual violation provision under 49 U.S.C. §31105(a)(1)(B)(i), I find that the appropriate regulation at issue would be 49 C.F.R. §395.3 (2004). The relevant portion states:

> (a) No motor carrier shall permit or require any driver used by it to drive a property-carrying commercial motor vehicle, nor shall any such driver drive a property carrying-commercial motor vehicle:
>
> (1) More than 11 cumulative hours following 10 consecutive hours off duty; or
>
> (2) For any period after the end of the 14th hour after coming on duty following 10 consecutive hours off duty, except when a property-carrying driver complies with the provisions of Sec. 395.1(o).

49 C.F.R. §395.3; *see also* 49 C.F.R. §392.3 (2004) (prohibiting drivers from operating commercial motor vehicles when they are fatigued). Examining these regulations under the protection afforded by §31105(a)(1)(B)(i), I must determine whether Complainant has established by a preponderance of the evidence that an actual violation of them occurred.

Complainant testified that had he driven the additional requested route on December 30, he would have exceeded allowable hours. (Tr. 51). By the time Complainant returned to the Doswell station he had been on duty for nine hours, driving and making stops to pick up grease. *Id*. at 44; *see also Id*. at 19. Walsh informed Complainant that had he driven the additional requested route, he would not have exceeded the maximum allowable hours. *Id*. at 51.

Given the above testimony, Complainant has failed to establish an actual violation of 49 C.F.R. §395.3 would have occurred. Complainant believed that driving the extra route on December 30 would have put him past the maximum hours; Respondent argues that taking the additional route would not have placed him past allowable hours. Attempting to demonstrate that Walsh was erroneous in his assertion that the requested route could be driven within

maximum allowable hours, Complainant submitted seven driving logs demonstrating the "magnitude" of the requested route. CX 3. Complainant did not testify how these logs demonstrate that the additional route would have put him past maximum allowable hours. Indeed, four of the logs show only four hours or less of driving time, while at least two other logs showing more than five hours of driving time list stops in addition to the ones requested by Respondent. *Id*. Complainant has therefore failed to satisfy his burden of proving that an actual violation occurred or would have occurred.

Additionally, Complainant provided no testimony to show that had he exceeded the maximum allowable hours on December 30, Respondent would have forced him to continue. To the contrary, Walsh offered him the option of driving the following day. Moreover, Walsh testified that company policy required Respondent to either pick up drivers who exceeded allowable hours, or place them in a hotel at Respondent's expense.[8] (Tr. 64).

Because of the above, I cannot say that Complainant engaged in activity protected under 49 U.S.C. §31105(a)(1)(B)(i). Consequentially, I find Complainant does not have a viable claim based upon his refusal to drive a vehicle in excess of maximum allowable hours on December 30, 2004.[9]

December 31, 2004

A. Driving an Unsafe Vehicle

Having determined that Complainant engaged in protected activity when he refused to operate Respondent's vehicle on December 30, 2004, I now address whether he has proven that he engaged in protected activity by refusing to drive on December 31, 2004.

I first find that my analysis of whether an actual violation would have occurred on December 31 is essentially the same as whether an actual violation would have occurred on December 30. As I discussed *supra*, although I believe Complainant presented enough evidence to demonstrate he had a reasonable apprehension of injury, it was not enough to satisfy 49 U.S.C. §31105(a)(1)(B)(i)'s requirement of an actual violation. Simply stated, the evidence is too uncertain to sufficiently show whether the operation of the truck would have resulted in an actual violation. Therefore, any alleged protected activity must fall within the confines of 49 U.S.C. §31105(a)(1)(B)(ii) if Complainant is to have a successful claim for refusing to drive on December 31.

As I also discussed *supra*, Complainant demonstrated that he indeed had a reasonable apprehension of injury associated with the truck. However, aside from issues Complainant had with the truck itself, Complainant also took issue with working on December 31 because of what

[8] When the primary truck broke down on December 28, Walsh asked Complainant to stay at a hotel until the truck was repaired but Complainant refused to do so.

[9] I note that 49 U.S.C. §31105(a)(1)(B)(ii) also protects drivers who have a reasonable apprehension that they are too fatigued to drive. *See Stauffer v. Wal-Mart Stores, Inc.*, ARB No. 99-107, ALN No. 1999-STA-021 (ARB Nov. 30, 1999). However, Complainant did not offer any testimony that he would be too tired or fatigued to run an additional route on December 30 or December 31; rather, he only testified that he believed running the route on December 30 would place him over the maximum allowable hours.

he perceived to be a company holiday. Complainant believed that Respondent had established a company policy that employees were not required to work on New Year's Eve. *Id*. at 45; *see also Id*. at 11.[10] As such, he believed it was improper for Respondent to ask him to work on December 31, although he did testify that the safety issues with the truck played a role in his decision not to work on December 31 as well. *Id*. at 11. Somewhat confusingly, Complainant also testified that regardless of the perceived holiday, he would have been willing to drive an additional route on December 31 had a different, safer truck been available. *Id*. at 53. He did not, however, inquire as to the availability of another truck because Durham was the closest location, and he knew they were short of trucks and would not be able to help. *Id*. at 52-53. This testimony raises three issues with Complainant's assertion that he chose not to drive the vehicle because of safety concerns.

First, Complainant's testimony demonstrates that he made no attempt to inquire whether a safer truck would be available for him to use on December 31.[11] Rather, Complainant merely assumed that Respondent and its personnel would have no such truck available. *Id*. at 40-41. The Administrative Review Board recently upheld an administrative law judge's finding of no retaliation under the STAA where an employee expressed concerns about his truck and refused to drive it, but chose not to take another available truck. *Prior v. Hughes Transport, Inc.*, ARB No. 04-044, ALJ No. 2004-STA-1 (ARB Apr. 29, 2005). Although the complainant in *Prior* testified he had no reason for not taking another vehicle, while the instant Complainant said he thought asking would be futile, I nevertheless find *Prior* persuasive. *Prior*, at 3, n.2. In other words, since Complainant never asked about another truck's availability, he never had the opportunity to learn whether or not it would be actually possible to get another truck.

Second, Complainant never expressed to Walsh that he was willing to work on December 31 if another truck were available. He unequivocally told Walsh that he would not work on that date.

Finally, and most importantly, Complainant's testimony demonstrates that his rationale for not driving on December 31 was largely based on his belief that he was not required to work on that day.[12] Whether Respondent was within its rights to require Complainant to work on a holiday is not an issue before me. What is at issue is whether his refusal to work was based upon the safety issues.

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[10] While the employee handbook merely states that New Year's Day is a paid holiday, and makes no mention of New Year's Eve, Walsh testified that because New Year's Day fell on a Saturday, December 31 was a holiday. CX 10, Tr. 70; *see also* Tr. 78-79.

[11] Complainant could have potentially had a successful claim under 49 U.S.C. §31105(a)(1)(B)(ii) had Respondent informed him that no other truck would be available for his route on December 31, 2004, and terminated him for his refusal to drive the route regardless.

[12] In a "Testimonial" that Complainant filed with OSHA and marked as Complainant's Exhibit 2, Complainant indicated that he raised the excess hours as well as the leakage, steering, and suspension problems to Walsh during their telephone conversation when he was asked to run the additional route. However, he recounted his response to Walsh after he returned the truck and was asked to work the following day as an alternative, as follows: "I told him '*New Year's Eve is a paid holiday given by the company, I definitely [am] not working,'* then I added '*Especially not after you caused me to be on-duty twenty one hours two days ago.[']* (CX 2).

In view of the above, I find that Complainant's refusal to drive a truck on December 31, 2004, was motivated not by concerns about the vehicle's safety; rather, Complainant did not want to drive on December 31st because he believed he was entitled to receive the day off. Complainant's statements at his hearing and in his "testimonials" demonstrate his reluctance to drive on the 31st because of the holiday. Also casting doubt on Complainant's claim was his failure to inquire into the availability of another vehicle to use on December 31 or to communicate his willingness to work if a safe truck were obtained. Taken together, these facts demonstrate that safe vehicle or no, Complainant did not intend to work on December 31. Therefore, I find that Complainant refused to drive Respondent's vehicle on December 31, 2004, because he did not want to work on the holiday, not because of safety issues with the truck.

B. Driving in Excess of Allowable Hours

Complainant offered no testimony or other evidence that had he driven an additional route on December 31, 2004, he would have exceeded the allowable hours set forth by the DOT. Indeed, Complainant conceded that had he driven the route on December 31, he would not have exceeded maximum allowable hours. *Id*. at 52. Consequentially, his operation of a vehicle for Respondent on December 31, 2004, would not have created a violation of either 49 U.S.C. §31105(a)(1)(B)(i) or §31105(a)(1)(b)(ii) with respect to exceeding allowable hours.

Causal Relationship

Although I have found that Complainant engaged in protected activity when he refused to drive Respondent's truck on December 30, 2004, he must still prove that this action caused his termination. For the reasons set forth below, I do not find that Complainant has sufficiently established causation.

In order to succeed in a STAA claim, Complainant must establish a causal relationship between Respondent's adverse action against him and his protected activity. *See Prior v. Hughes Transport, Inc.*, ARB No. 04-044, ALJ No. 2004-STA-1 (ARB Apr. 29, 2005); *Schwartz v. Young's Commercial Transfer, Inc.*, ARB 02-122, ALJ No. 2001-STA-33 (ARB Oct. 31, 2003). Although Complainant has established that he engaged in protected activity under the STAA, he has failed to establish a causal relationship between the protected activity and Respondent's alleged adverse action (i.e., terminating Complainant's employment) based upon the same deficiencies discussed above. Specifically, in response to his articulated concerns over both the truck's safety and his driving in excess of allowable hours, he was given the option of working the following day, a holiday. However, he refused to do so based upon the articulated rationale that he was entitled to have the holiday off. Although he testified that he assumed no safe truck would be available on that date, he never articulated his willingness to Walsh to work if a safe truck were made available to him. In fact, Walsh testified that he was in the process of obtaining a replacement truck. Because Complainant did not report for work on December 31, he was unable to establish that no replacement truck would have been available. Thus, the nexus between Complainant's protected activity and his termination was severed when he refused Respondent's offer to work on the 31st.

Respondent's articulated rationale for Complainant's termination was that he failed to report for work on December 31. I find that Complainant has failed to establish that the articulated reason was a pretext for his dismissal, and not the true reason. Rather, the evidence established that Complainant was terminated for failure to report to work on December 31. Therefore, he cannot establish a causal relationship between any protected activity and his termination as his termination was not based upon the protected activity he engaged in. Consequentially, Respondent did not violate the STAA when it decided to terminate Complainant's employment relationship.

CONCLUSION

Because Complainant cannot prove by a preponderance of the evidence that he was terminated because he engaged in activity protected under the STAA, I find that he has not proved unlawful retaliation forbidden by the STAA. Therefore,

ORDER

IT IS HEREBY ORDERED that the Complainant's claim be, and hereby is, **DISMISSED**.

A

PAMELA LAKES WOOD
Administrative Law Judge

Washington, D.C.

NOTICE OF REVIEW: The administrative law judge's Recommended Decision and Order, along with the Administrative File, will be automatically forwarded for review to the Administrative Review Board, U.S. Department of Labor, 200 Constitution Avenue, NW, Washington, DC 20210. See 29 C.F.R. § 1978.109(a); Secretary's Order 1-2002, ¶4.c.(35), 67 Fed. Reg. 64272 (2002).

Within thirty (30) days of the date of issuance of the administrative law judge's Recommended Decision and Order, the parties may file briefs with the Board in support of, or in opposition to, the administrative law judge's decision unless the Board, upon notice to the parties, establishes a different briefing schedule. See 29 C.F.R. § 1978.109(c)(2). All further inquiries and correspondence in this matter should be directed to the Board.